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# In the Supreme Court of the United States

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

*v.*

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.

ENERNOC, INC., ET AL., PETITIONERS

*v.*

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR FOURTEEN UTILITIES INCLUDING CONSOLIDATED EDISON CO. OF NEW YORK AND AFFILIATES; NATIONAL GRID USA AND AFFILIATES; AND NORTHEAST UTILITIES DBA EVERSOURCE ENERGY AND AFFILIATES AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Federal Power Act, which grants the Federal Energy Regulatory Commission jurisdiction over "any rule, regulation, practice, or contract affecting" wholesale electricity rates (16 U.S.C. § 824e(a)), authorizes the agency to regulate the price paid by operators of regional wholesale electricity markets to market participants who offer to reduce their electricity consumption during periods of peak demand.

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*ISO New England, Inc. and New England Power Pool Participants Committee*,
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*New England Power Generators Ass'n* v. *ISO New England, Inc.*, FERC Docket No. EL15-21-000 (Nov. 14, 2014) ..... 19

**MISCELLANEOUS**

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*2017/2018 Base Residual Auction Report* (June 18, 2014), http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2017-2018-base-residual-auction-report.ashx ..... 20

*Annual Forward Capacity Market Auction Acquires Major New Generation Resources for 2018-2019*, ISO-NE Press Release (Feb. 4, 2015), http://www.iso-ne.com/static-assets/documents/2015/02/fca9_initialresults_final_02042015.pdf ..... 21

Connecticut Dep't of Energy and Envtl. Protection, *Draft Integrated Resource Plan* (Dec. 11, 2014), http://www.ct.gov/deep/lib/deep/energy/irp/2014_irp_draft.pdf ..... 22

Gordon Van Weile, *State of the Grid: Managing a System in Transition* (Jan. 21, 2015), http://www.iso-ne.com/static-assets/documents/2015/01/stateofgrid_presentation_01212015.pdf ..... 22

Office of Enforcement, Federal Energy Regulatory Comm'n, *2013 State of the Markets Report*, http://www.ferc.gov/market-oversight/reports-analyses/st-mkt-ovr/2013-som.pdf ..... 22

*The 2017/2018 RPM Base Residual Auction: Sensitivity Analyses Revised*, Monitoring Analytics, LLC, 3-6 (Aug. 26, 2014), www.monitoringanalytics.com/reports/Reports/2014/IMM_20172018_RPM_BRA_Sensitivity_Analyses_Revised_20140826.pdf ..... 20

United States Dep't of Energy, *Nat'l Transmission Grid Study* (May 2002), http://www.ferc.gov/industries/electric/indus-act/transmission-grid.pdf ..... 21

## INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The D.C. Circuit's decision that FERC lacks jurisdiction to specify the price that operators of wholesale electricity markets pay those who voluntarily reduce consumption during periods of high demand urgently warrants review. That divided ruling raises vital issues of national importance—not only to FERC's ability to regulate the price paid for "demand response," but also to its ability to set rules for the wholesale electricity markets in general. In conflict with 70 years of this Court's precedent, the decision misinterprets the statutory provisions that have supported FERC's regulation of wholesale markets since 1935, when Congress enacted the Federal Power Act. And with respect to demand response alone, the decision has major implications for both electricity prices and reliability in two-thirds of the Nation.

*Amici curiae* are fourteen companies that transmit and distribute electricity in New York, New Jersey, Pennsylvania, and New England. *Amici* were parties to the rulemaking that led to FERC Order No. 745—the "demand response rule." Together, *amici* serve over 10 million customers in seven States. See Appendix (complete list and description of *amici*).

To obtain electricity on behalf of their customers, *amici* rely on wholesale markets operated by Independent Systems Operators ("ISOs") and Regional

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* Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

Transmission Organizations ("RTOs") in three different regions. Indeed, *amici* were among the utilities responsible for creating the New York and New England ISOs. Collectively, transactions in the three wholesale markets in which *amici* participate well exceed $40 billion annually.

By providing an alternative means of balancing supply and demand, the participation of demand-response providers in the wholesale markets directly affects the price and availability of the electricity on which *amici* and their customers rely. Thus, *amici* have a vital interest in the Court's review of this case.

*Amici* hold differing views as to the D.C. Circuit's decision that the specific compensation methodology required by FERC's current demand response rule violates the Administrative Procedure Act ("APA"). *Amici* are united, however, in the belief that review of the D.C. Circuit's jurisdictional ruling is needed regardless of the validity of that rule. If, as *amici* believe, FERC may regulate what ISOs and RTOs pay demand responders who voluntarily bid into wholesale energy markets, then the agency can issue a new rule that *does* satisfy its statutory obligations. Thus, whatever the merits of FERC's current rule—which the United States is not defending (Pet. 35)—this Court's resolution of the jurisdictional question is of great significance for *amici* and the wholesale electricity markets on which their customers rely.

Although the demand response rule applies only to wholesale electricity markets, the significance of the decision below is potentially magnified because the FPA provisions at issue also govern FERC's jurisdiction over the other wholesale electricity markets run by ISOs and RTOs—the capacity and ancillary

services markets. FERC's authority over all three markets is critical to ensuring an adequate supply of electricity at reasonable rates. Further, the markets are highly interdependent, and annually contribute hundreds of billions of dollars to the economy.

In particular, *amici* wish to highlight the practical effects of the ruling below on rates and reliability. By way of background, FERC-regulated ISOs and RTOs run the high-voltage transmission grid and wholesale electric markets in two-thirds of the country. ISOs and RTOs run auction-based wholesale markets that balance supply and demand and provide wholesale power at just and reasonable rates. ISOs and RTOs do so by taking offers from generators who agree to supply power at a specific price and quantity, and matching these offers with bids reflecting wholesale purchasers' demand for electricity ("load"), until demand is satisfied. Typically, all suppliers are paid the same price as the last accepted offer.

At the same time, ISOs and RTOs also accept offers from demand-response providers who offer to forgo consumption of electricity in exchange for a price. These offers reduce the amount of electricity that must be purchased from generators—especially the highest-cost generators—which in turn reduces the cost of electricity to the market as a whole. Demand-response offers also decrease the amount of generating capacity that ISOs and RTOs must procure in separate FERC-regulated "capacity auctions" to ensure that there are adequate resources to meet anticipated demand. The effect on prices is magnified in the capacity markets because the offers are placed for times of peak energy demand, when supply is tightest.

ISOs and RTOs thus use demand response to reduce the cost of electricity, to balance supply and demand, and to ensure both the reliability and stability of the region's power grid. Indeed, "by definition," FERC's demand response rule "applies only when the demand response * * * alters the wholesale electricity price." App. 40a (Edwards, J., dissenting))—*i.e.*, only when demand response is needed to balance supply and demand and will affect wholesale prices.

If allowed to stand, the decision below could bar FERC from setting *any* rules, no matter how just and reasonable, that provide for ISOs and RTOs to pay demand-response providers who wish participate in the various wholesale markets. As FERC notes, the decision even casts doubt on "whether [FERC] has authority to permit the participation of demand-response providers in wholesale-electricity markets at all" (Pet. 30-31)—and that result would significantly increase the cost of electricity.

Either way, the ruling threatens harmful economic and reliability consequences. *Amici* often act as load serving entities ("LSEs") that purchase power in wholesale markets for resale to their end-user customers. If FERC cannot set the price that ISOs and RTOs pay demand responders, then end-users and aggregators (who manage demand reductions on end-users' behalf) will not be able to submit curtailment bids into the wholesale markets. The economics of supply and demand thus dictate that *amici* (and companies like them) will pay far more to purchase electricity from generators. And when demand is high, ISOs and RTOs must turn to the most expensive generation to meet demand. This translates into higher prices for tens of millions of consumers.

For example, Con Edison estimates that, without demand response, costs in just one of its zones would increase by approximately 20 percent—potentially leading to additional costs exceeding $200 million in the summer alone. Similarly, a report produced by PJM's Independent Market Monitor determined that, all else being equal, if there were no offers for demand response or Energy Efficiency in the 2017-2018 auction period, consumers would pay an additional $9.3 billion, or 124.4 percent, for electricity.

These unfortunate results are not required by the FPA. The decision below rests on the notion that, in regulating the price paid by ISOs and RTOs for those who contract with them to reduce the need for supply in the wholesale electricity markets, FERC is regulating the "retail" market—the domain of the States. But that is a misconception.

In specifying the price that ISOs and RTOs pay demand responders who voluntarily bid into wholesale markets, FERC is simply exercising its authority to regulate "practice[s] or contract[s] affecting" wholesale rates. 16 U.S.C. § 824e(a). Indeed, both the majority and the dissent below recognized that demand response has a "direct" effect and a "significant impact on the wholesale market." App. 7a, 14a; see App. 19a, 39a (Edwards, J., dissenting). That should have been the end of the matter.

The court below nonetheless held that FERC lacks jurisdiction. The court reasoned that the FPA commits "retail" electricity sales to state regulation, that "FERC's reach 'extend[s] only to those matters which are not subject to regulation by the States,'" and that "[t]he broad 'affecting' language of §§ 205 and 206

does not erase the specific limits of § 201." App. 8a-9a (quoting 16 U.S.C. § 824(a)).

As the majority (and dissent) elsewhere acknowledged, however, a demand response bid is not a retail "sale"—and certainly not unambiguously so. App. 6a; App. 34a (Edwards, J., dissenting). Thus, it cannot fall within exclusive state jurisdiction under § 201(b). See 16 U.S.C. § 824(b)(1) (FERC's jurisdiction "shall not apply to any other sale of electric energy" besides "sale[s] of electric energy at wholesale"). And the decision below conflicts with seven decades of precedent holding that "the precise reserved state powers language in § 201(a)" is a "mere policy declaration that cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *New York* v. *FERC*, 535 U.S. 1, 22 (2002) (quoting *FPC* v. *So. Cal. Edison Co.*, 376 U.S. 205, 215 (1964), in turn quoting *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 527 (1945)) (internal quotation marks omitted).

The fact that ISOs and RTOs need accept demand response bids only if "permitted by the laws or regulations of the relevant electric retail regulatory authority" (18 C.F.R. § 35.28(g)(1)(i)(A)) further undermines the decision below. And, of course, retail customers remain free to sell demand response resources to non-jurisdictional entities, and thus to avoid participating in FERC's wholesale markets altogether.

The court below was troubled that FERC's rule set a high price to be paid to demand-response providers —and thus that FERC's rule had the possible effect of inducing consumers to bid into the wholesale market with promises to reduce consumption. But that goes to the specific level of compensation that demand re-

sponse providers should be paid—*i.e.*, to the merits of the dispute, which FERC is not appealing. Because demand response directly affects wholesale market prices, and because the FERC rule at issue governs those who operate the wholesale markets, there can be no serious question that FERC has jurisdiction to issue such a rule. And in all events, the issue is one of national importance that warrants an answer from this Court.

## STATEMENT

1. The FPA directs FERC to "assur[e] an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources." 16 U.S.C. § 824a(a); see *NAACP* v. *FPC*, 425 U.S. 662, 670 n.5 (1976). To that end, the Act gives FERC jurisdiction over the "sale of electric energy at wholesale in interstate commerce" and "the transmission of electric energy in interstate commerce." 16 U.S.C. § 824(b).

Related FPA provisions grant FERC the authority to approve the rates and charges that ISOs and RTOs pay "for or in connection with" electricity sales, including "all rules and regulations affecting or pertaining to such rates or charges." *Id.* § 824d(a). Similarly, FERC has statutory authority to alter "any rule, regulation, practice, or contract affecting such rate, charge, or classification" if it is "unjust, unreasonable, unduly discriminatory[,] or preferential." 16 U.S.C. § 824e(a).

2. In many parts of the country, including New York and New England, the transmission and distribution of electricity have been separated from the

sale of energy—which gives retail customers access to competing suppliers of electricity. Transmission facility owners such as *amici* have turned over the operation of their transmission assets to ISOs and RTOs, which operate regional power grids. In addition, in many regions of the country, local utilities have largely divested their generation assets and rely on competitive wholesale markets for energy, capacity, and ancillary services to serve their customers.

Electricity is produced and consumed in real time, and FERC's settled method for setting wholesale electricity prices uses the bid from the last (and most expensive) generating unit needed to satisfy demand to set the price paid on all accepted bids. Consumers, by contrast, typically do not adjust their consumption in response to real-time wholesale price signals. Recognizing this reality, Congress, FERC, state public utility commissions, ISOs, and RTOs have all come to appreciate that demand response is a critical tool to help grid operators manage their systems, particularly at times of peak demand. Over the last decade, therefore, ISOs and RTOs have increasingly relied on the availability of demand response to provide reliable electric service and reduce the price of power. Throughout this period, FERC has specified the price paid by ISOs and RTOs for such demand response.

3. Recognizing the importance of demand response to the supply and price of electricity in wholesale markets, FERC has conducted numerous rulemakings devoted to the issue of demand response. *Amici* participated in the rulemaking that led to the rule at the heart of this case.

Ultimately, following two rounds of notice and comments and a technical conference open to all in-

terested parties, FERC promulgated the demand response rule at issue here—"Order No. 745." That Order set the ground rules governing what ISOs and RTOs must pay demand response providers who promise to forgo energy consumption and place bids to participate in wholesale markets. Specifically, FERC decided that demand response providers must be compensated at the same "locational marginal price," or "LMP," rate that is used to compensate generators who supply power to the wholesale market. But unlike generators—who incur costs in supplying power to the grid—demand responders *save* energy costs by forgoing consumption. Nonetheless, FERC rejected comments that ISOs and RTOs should not be required to pay demand responders and generators the same rate.

Commissioner Moeller dissented, finding that the rate structure set forth in Order No. 745 discriminated against generators. Yet he did not dispute FERC's jurisdiction to regulate the rates that ISOs and RTOs may pay demand responders who participate in wholesale markets. And as he emphasized, "demand response plays a very important role in [wholesale] markets by providing significant economic, reliability, and other market-related benefits." App. 156a.

4. Respondents, which include organizations representing electricity generators, appealed to the D.C. Circuit. They challenged both FERC's authority to issue Order No. 745 and its validity under the APA. By a 2-1 vote, the court sided with respondents on both issues.

The court principally reasoned that the FPA "unambiguously" bars FERC from regulating the rate that ISOs and RTOs pay demand response providers

bidding into the wholesale markets. App. 5a-14a. The majority acknowledged "the direct link between the wholesale and retail markets," as well as the fact "that demand response compensation affects the wholesale market." App. 7a; see also App. 14a (acknowledging "the importance of demand response resources to the wholesale market" and its "significant impact on the wholesale market"). Nonetheless, despite finding that demand response does not involve a retail sale—or indeed any sale—it concluded that those who provide demand-response bids are end-user customers, and thus that FERC was attempting to regulate the "retail market" that Congress reserved to the States. App. 10a–11a. Alternatively, the majority held that the compensation methodology set forth in Order No. 745 was arbitrary and capricious, and thus violated the APA, by unfairly discriminating between generators and demand responders. App. 15a-16a.

Judge Edwards dissented. As he recognized, "forgone consumption is not unambiguously a 'sale,' nor does the [FPA] dictate that demand response be treated solely as a matter of retail regulation." App. 41a. In addition, because Order No. 745 "narrowly appl[ies] *only* to demand response resources that by definition directly affect the wholesale rates of electricity," the Order "falls squarely within the Commission's 'affecting' jurisdiction." *Ibid.* (citing 16 U.S.C. §§ 824d, 824e).

## REASONS FOR GRANTING THE WRIT

**The D.C. Circuit's decision casts doubt on FERC's authority to review tariffs for any goods or services affecting wholesale rates—and may eliminate demand response entirely in the wholesale markets in 38 States.**

The D.C. Circuit's divided ruling threatens not only demand response, but FERC's jurisdiction over wholesale electricity prices, and the energy markets as a whole. The majority's view that FERC lacks jurisdiction rests on the erroneous proposition that the agency's *direct* regulation of the rates that regional entities pay for demand response in *wholesale* markets intrudes on the States' "exclusive authority to regulate the retail market." App. 8a. Indeed, the court reached this result while acknowledging—repeatedly—"that demand response compensation affects the wholesale market" in "significant" and "important[]" ways. App. 7a, 14a. The decision thus calls into question long-settled legal interpretations of the key provision supporting FERC's regulation of practices affecting rates in the wholesale electric markets.

This ruling's potential effects on demand response and wholesale prices in the 38 States subject to regional RTOs or ISOs alone warrant review. But the lower court's reasoning also casts doubt on FERC's ability to regulate a host of other practices that significantly affect wholesale rates in the energy, capacity, and ancillary services markets—in conflict with 70 years of this Court's precedents. For these reasons too, the decision calls out for review.

### A. FERC's existing role reviewing tariffs for reasonableness and permitting demand response

FERC has long had a role in demand response. Nor is this surprising. ISOs and RTOs are FERC-created and FERC-regulated entities. And, by Congress's design, FERC regulates anything and everything that directly affects prices in the wholesale capacity, energy, and ancillary services markets.

As the court below recognized, FERC "has issued dozens of orders on demand-side resource participation." App. 3a. Starting in the early 2000s, FERC approved tariffs that allowed ISOs and RTOs to purchase demand response in their energy markets. Order No. 745 ¶ 13 n.27 (App. 63a). In 2007 and 2008, as demand response became more accepted as a reliable part of balancing supply and demand, FERC approved rules allowing these jurisdictional entities to purchase demand response in their ancillary services and capacity markets. Order 890, 118 FERC ¶ 61,119 (2007); Order 719, 125 FERC ¶ 61,071 (2008). Ultimately, FERC promulgated Order No. 745, which specifies the rates that ISOs and RTOs must pay for demand response in the wholesale energy markets. This approach helps these system operators both balance supply and demand, which ensures reliability, and reduce the cost of providing wholesale service. Order No. 745 ¶¶ 55-56 (App. 95a-96a), ¶ 59 (App. 99a).

Thus, FERC has always regulated the rates, terms, and conditions upon which demand-response providers participate in organized wholesale markets. At the same time, FERC has never attempted to compel retail customers to provide demand response.

In fact, FERC's rules expressly state that States may bar retail customers from participating in the ISO-RTO demand response market. As the FERC regulations at issue provide, ISOs and RTOs may not accept demand response bids if "not permitted by the laws or regulations of the relevant electric retail regulatory authority." 18 C.F.R. § 35.28(g)(1)(i)(A). To date, no State within the *amici curiae*'s service territories has taken such action.

In short, FERC has long recognized the direct importance of demand response to wholesale markets. Further, FERC's rule is narrowly tailored to the effect of demand response on wholesale electricity prices. And, as explained below, this "agency interpretation of 'longstanding' duration" should have been "accord[ed] particular deference" below. *Barnhart* v. *Walton*, 535 U.S. 212, 219-220 (2002).

### B. FERC's "affecting" jurisdiction authorizes the agency to review prices paid for all goods or services, including demand response, purchased by an ISO or RTO in providing wholesale services.

The FPA grants FERC exclusive authority to regulate both "the sale of electric energy at wholesale in interstate commerce" and "any rule, regulation, *practice, or contract* affecting" wholesale rates. 16 U.S.C. §§ 824(b)(1), 824e(a) (emphasis added). Moreover, the court below repeatedly acknowledged "that demand response compensation affects the wholesale market" in "significant" and "important[]" ways. App. 7a, 14a. Nonetheless, the court held that FERC's regulation of what ISOs and RTOs may pay demand responders who bid into the *wholesale* market "encroach[es] on the states' exclusive jurisdiction to

regulate the retail market." App. 2a. The court was mistaken.

1. The court below was troubled by what it perceived as the lack of a "limiting principle" in FERC's assertion of jurisdiction. App. 8a. "Without boundaries," the court surmised, "§§ 205 and 206 [of the Federal Power Act] could ostensibly authorize FERC to regulate any number of areas, including steel, fuel, and labor markets." App. 8a. But this analysis suffers from numerous difficulties and, left uncorrected, would cast a shadow over FERC's settled jurisdiction over practices affecting the wholesale markets.

First, FERC is not attempting to regulate the retail electricity market, let alone writ large. On the contrary, the regulations at issue expressly bar ISOs and RTOs from accepting demand response bids where "not permitted by [state] laws or regulations." 18 C.F.R. § 35.28(g)(1)(i)(A).

To be sure, Order No. 745 lies at the intersection of the retail and wholesale markets. But the Order specifies what prices regional wholesale market operators may pay demand responders who contractually bid into the wholesale markets. That falls squarely within FERC's exclusive jurisdiction to regulate "practice[s] or contract[s] affecting" wholesale rates. 16 U.S.C. § 824e(a). As Judge Edwards observed in his dissent, FERC's compensation rule "applies only when the demand response *by definition* alters the wholesale electricity price." App. 40a.

Indeed, the court below recognized the "direct link between" the retail and wholesale markets in this context, explaining that "demand response compensation" has a "significant impact on the wholesale mar-

ket." App. 7a, 14a. As the dissent below explained, this compensation rate has "about as 'direct' an effect and as clear a 'nexus' with the wholesale transaction as can be imagined." App. 40a. Thus, whatever the outer boundary of FERC's jurisdiction, this is not a close case: The relationship between demand response participation and wholesale rates is not tangential or attenuated, but clear and immediate.

Second, the majority's analysis directly conflicts with *New York* v. *FERC*, 535 U.S. 1 (2002), *FPC* v. *So. Cal. Edison Co.*, 376 U.S. 205 (1964), and *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515 (1945)—70 years of this Court's precedent interpreting the scope of FERC's jurisdiction under the FPA. As those decisions hold, "the precise reserved state powers language in § 201(a)" is a "mere policy declaration that cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *New York*, 535 U.S. at 22 (quoting *So. Cal. Edison* and *Connecticut Light & Power*); see App. 34a (Edwards, J., dissenting). Thus, even if FERC's regulation of the rates that ISOs and RTOs pay for demand response in the wholesale market has downstream effects at the retail level, it is dispositive that the regulation fits comfortably within the "clear and specific grant of jurisdiction" provided by § 824e(a). Indeed, unlike FERC, States have no "affecting" jurisdiction" —the federal and state grants of authority are not "symmetrical." EnerNOC Pet. 23.

Third, reading § 201(a) to trump an express grant of FERC's jurisdiction is especially unjustified when the relevant phrase of that section limits state authority to "sale[s] of electric energy." 16 U.S.C.

§ 824(b)(1). Order No. 745 does not regulate retail sales of electricity. Indeed, both the majority and dissent below agreed that the "forgone consumption" that constitutes demand response "is no 'sale' at all." App. 6a; 34a. That too should have been dispositive. See also *FPC* v. *La. Power & Light Co.*, 406 U.S. 621, 637-638 (1972) ("§ 1(b) [of the FPA] withheld from FPC only rate-setting authority with respect to direct sales"); *Nw. Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 518 (1989) ("The congressionally designed interplay between state and federal regulation under the NGA does not * * * permit States to attempt to regulate pipelines' purchasing decisions in the mere guise of regulating production").[1]

Fourth, it is untenable to suggest that FERC's rate-setting rule here affects the wholesale market as indirectly as regulating, say, the price of steel. See App. 8a. Purchases of steel are at least one step further removed from practices, such as demand response, that directly and substantially affect the supply and price of electricity in wholesale markets.

FERC is obligated to ensure that the rate that jurisdictional entities charge wholesale customers is not "unjust" or "unreasonable." 16 U.S.C. § 824e(a). The agency has not only "ample authority," but "the duty," in reviewing costs incurred by jurisdictional entities in providing jurisdictional services, "to allow

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[1] Although these cases involved the Natural Gas Act (NGA), it is this Court's "established practice" to "cit[e] interchangeably decisions interpreting the pertinent sections of the [NGA and FPA]." *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).

only such rates as will prevent consumers from being charged any unnecessary or illegal costs." *NAACP* v. *FPC*, 425 U.S. 662, 668-669 (1976) (FPC has the duty to prevent rates based on "unnecessary labor costs"). Thus, FERC's regulation of ISOs' and RTOs' payments for demand response in these wholesale markets—which has direct and substantial effects on wholesale electricity prices—is far removed from the outer limits of its jurisdiction. As Judge Edwards' dissent put it, the demand response rule "preserves State regulation of retail markets" and "is hardly the stuff of grand agency overreach." App. 33a.

Finally, insofar as there is any "statutory ambiguity" in either FERC's grant of jurisdiction or the Act's reservation of certain powers to the States, FERC's reasonable interpretation is entitled to *Chevron* deference. *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868, 1874-1875 (2013). Here, both the majority and dissent below agreed that a demand response bid is not a "sale" at all—let alone an unambiguous sale. App. 6a, 34a. In another recent case, moreover, the D.C. Circuit held that "Section 206 is ambiguous" and deferred to FERC's reasonable interpretation of the phrase "practice * * * affecting [a] rate" in the face of claims that the agency's interpretation interfered with "state law." *So. Carolina Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014) (alterations in original). The court's failure to reach the same conclusion here, where the stakes are far higher, calls out for review.

2. The court below also expressed concern that the substantial effect of demand response on rates might be the result of the "richness of the incentives FERC commands"—seemingly suggesting that FERC

created the basis for its own jurisdiction. App. 8a. But in enacting the Energy Policy Act of 2005, Congress expressly mandated that "unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated." EPAct § 1252(f), 119 Stat. 594. The majority below recognized that Congress intended for FERC to "encourage" demand response in wholesale markets. App. 13a. FERC was simply doing its part to carry out this direct congressional mandate.

Nor is there anything unusual about the manner in which FERC set about to do that. In fact, in another case, the D.C. Circuit recently called it a matter of "basic economic principles" that FERC may remove "barrier[s] to entry" that "are likely to have a direct effect on * * * costs" and make it "unlikely" that certain parties will "participate in the * * * market." *So. Carolina Pub. Serv. Auth.*, 762 F.3d at 74. Similarly here, FERC sought to remove "barriers" to "demand response participation in organized wholesale energy markets." App. 96a-97a. That is a quintessential role for an agency such as FERC, which is charged by law to incentivize economic behavior that ensures "just and reasonable" wholesale rates.

### C. If FERC may not set rates paid to demand responders who bid in wholesale markets, demand response could potentially be eliminated from those markets—imposing major costs on *amici* and their customers.

If the decision below is allowed to stand, then FERC may be unable to permit any demand response to participate in wholesale markets. FERC routinely reviews whether ISO and RTO rules governing the prices paid for wholesale market products will pro-

duce just and reasonable rates. But if FERC may not determine the rate to be paid to demand responders who bid into the wholesale markets, then FERC may not approve or disapprove any ISO or RTO tariff that describes the price paid for demand response—which suggests that ISOs and RTOs cannot purchase demand response in wholesale markets at all. That result would severely curtail the ability of wholesale market operators to provide reliable and cost-effective energy to consumers. It would also impose significant burdens on the *amici*, both economically and in terms of the reliability of electric service.[2]

For example, as noted above, Con Edison estimates that, without demand response, costs in just one of its zones could increase by roughly 20%, potentially leading to additional costs in excess of $200 million in the summer months alone.[3] Similarly, a report produced by PJM Interconnection's Independent Market Monitor determined that, all else being equal, without offers for demand response or Energy Efficiency in the 2017-2018 auction periods, consumers

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[2] Nor are these concerns hypothetical. Immediately after the court below ruled, various parties brought challenges before FERC to remove all demand response from wholesale markets (including capacity markets). See *FirstEnergy Serv. Co.* v. *PJM Interconnection, L.L.C.*, FERC Docket No. EL14-55-000 (May 23, 2014); *New England Power Generators Ass'n* v. *ISO New England, Inc.*, FERC Docket No. EL15-21-000 (Nov. 14, 2014).

[3] Con Edison conducted this analysis using 2014 NYISO market price data for "Zone J."

across the Mid-Atlantic region would pay an additional 124.4%—$9.3 billion—for electricity.[4]

Disqualifying existing wholesale demand response would also negatively affect the bulk power system's reliability. For example, in planning its bulk power system, the New York Independent System Operator ("NYISO") depends on the availability of demand reduction resources during scarcity conditions.[5] Specifically, the NYISO's current plans assume that 1,189 MW of reliability-based demand response resources will be available statewide.[6] Thus, the loss of these resources would substantially increase the likelihood that the NYISO would have to take emergency measures during scarcity periods.

Similarly, for PJM, roughly 8% of peak summer load is served by demand response resources.[7] Replacing the resources that ensure reliable service during these critical periods could take significant time.

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[4] *The 2017/2018 RPM Base Residual Auction: Sensitivity Analyses Revised*, Monitoring Analytics, LLC, 3-6 (Aug. 26, 2014), www.monitoringanalytics.com/reports/Reports/2014/IMM_20172018_RPM_BRA_Sensitivity_Analyses_Revised_20140826.pdf.

[5] *2014 Reliability Needs Assessment* (Sept. 16, 2014), http://www.nyiso.com/public/webdocs/media_room/press_releases/2014/Child_Reliability_Needs_Assessment/2014%20RNA_final_09162014.pdf.

[6] *Ibid.*

[7] *2017/2018 Base Residual Auction Report* (June 18, 2014), http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2017-2018-base-residual-auction-report.ashx

Meanwhile, grid reliability could be compromised. As FERC notes, "[t]he Department of Energy has found that, in particular locations at peak times, employing demand response may be the only way to balance supply and demand and thus to avoid power interruptions." Pet. 32 (citing U.S. Dep't of Energy, *National Transmission Grid Study* 41 (May 2002)).

The ability of ISO New England Inc. (ISO-NE) to operate the region's grid reliably and economically would likewise be compromised if demand response resources could not take part in its wholesale energy, capacity, and operating reserves markets. In fact, FERC recently authorized ISO-NE to fully integrate demand response into these markets by June 2017.[8]

Even now, demand response actively participates in ISO-NE's capacity market, as 2,803 MW of demand resources recently cleared in ISO-NE's 2015 Forward Capacity Auction.[9] The continued participation of demand resources is critical to ISO-NE's ability to manage two important trends in the New England wholesale power market: (1) retirements of coal-fired and nuclear generating capacity; and (2) a shortage of

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[8] *ISO New England, Inc. and New England Power Pool Participants Committee*, 150 FERC ¶ 61,007 (2015).

[9] *Annual Forward Capacity Market Auction Acquires Major New Generation Resources for 2018-2019*, ISO-NE Press Release (Feb. 4, 2015), http://www.iso-ne.com/static-assets/documents/2015/02/fca9_initialresults_final_02042015.pdf.

interstate natural gas pipeline capacity during peak periods.[10]

Although it is difficult to measure precisely the impact of losing demand response in these markets, FERC has noted in one of its annual reports that "[n]ortheast RTOs called upon their emergency demand response programs for a combined total of 13 days in 2013, more than in any of the last five years, underscoring the resource value of demand response during periods of tight supply conditions."[11] State regulators have also expressed concern that "the uncertainties raised by the D.C. Circuit * * * have the potential to undermine resource adequacy and drive up energy prices in the near term, at a time when the region is also facing a shortage of generation capacity and retirements of substantial amounts of non-gas resources."[12]

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[10] Gordon van Weile, *State of the Grid: Managing a System in Transition* (Jan. 21, 2015), http://www.iso-ne.com/static-assets/documents/2015/01/stateofgrid_presentation_01212015.pdf.

[11] Office of Enforcement, Federal Energy Regulatory Comm'n, *2013 State of the Markets Report* 13 http://www.ferc.gov/market-oversight/reports-analyses/st-mkt-ovr/2013-som.pdf.

[12] *Connecticut Dep't of Energy and Envtl. Protection Draft Integrated Resource Plan* 82 (Dec. 11, 2014) ("The Department believes that if DR were unable to participate in the forward capacity auction capacity costs could potentially increase by hundreds of millions of dollars for Connecticut ratepayers.").

Given that most ISO and RTO markets cross state lines—the PJM Interconnection alone operates in 13 States and the District of Columbia—a transition for existing demand response providers from wholesale to retail market participation could prove difficult, if not impossible, to achieve in a consistent and expeditious manner. Today, demand responders need only comply with one set of policies that applies in every State within the ISO/RTO region. Allowed to stand, however, the decision below would likely create a system in which state-law variations led to complications, uncertainty, and barriers to market entry by demand responders—in violation of Congress's express mandate in the Energy Policy Act of 2005.

For example, demand-response providers that now aggregate resources across several service territories and make a single bid into the PJM market would need to coordinate and verify demand response capabilities with each LSE where its customers were located, creating multiple layers of regulatory compliance before the load reduction from demand response could be reflected in the bulk power market. These added transaction costs are certain to reduce the economic viability of some demand response bids, thus harming the reliability of service and raising prices. In short, the decision below threatens to cast demand response providers into a complex web of regulatory variations, including gaps in participation, if they participate in the market at all—to the ultimate detriment of consumers.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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# APPENDIX

## APPENDIX: LIST OF *AMICI CURIAE*

***The Consolidated Edison Company of New York, Inc. ("Con Edison")*** serves approximately 3.3 million electric customers, 1.1 million gas customers, and 1,700 steam customers. Con Edison is a transmission owner in the NYISO control area, a load serving entity, and a distribution provider in New York City and parts of Westchester County. ***Orange and Rockland Utilities, Inc. ("O&R")***, a Con Edison affiliate, is a regulated public utility that provides electric and gas service to customers in all or parts of Rockland, Orange, and Sullivan Counties, New York. O&R's utility subsidiary, ***Rockland Electric Company***, provides electric service to customers in parts of Bergen, Passaic, and Sussex Counties, New Jersey. O&R's subsidiary, ***Pike County***, provides service to approximately 300,000 electric customers and more than 100,000 gas customers.

***National Grid USA***, its New York affiliate, ***Niagara Mohawk Power Corporation***, and its New England affiliates, ***Massachusetts Electric Company, Nantucket Electric Company, The Narragansett Electric Company***, and ***New England Power Company*** (together "National Grid"), serve approximately 3 million customers in New York and New England. National Grid is a market participant in the wholesale electric markets in both New York and New England.

***Northeast Utilities, doing business as Eversource Energy ("Eversource")***, and its wholly owned utility subsidiaries ***The Connecticut Light and Power Company ("CL&P"), NSTAR Electric Company ("NSTAR Electric"), Western Massachusetts Electric Company ("WMECO"), Public***

***Service Company of New Hampshire ("PSNH"), NSTAR Gas Company,*** and ***Yankee Gas Services Company*** (each doing business as Eversource Energy), operate New England's largest energy delivery system, with 3.6 million electric and gas customers. Eversource's electric utilities are market participants in the competitive wholesale electric markets that are administered by ISO New England Inc.